



May 28, 2002

Mr. Mark B. Taylor  
City Attorney  
City of San Marcos  
630 East Hopkins  
San Marcos, Texas 78666

OR2002-2839

Dear Mr. Taylor:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163529.

The City of San Marcos (the “city”) received a request for the “before and after” plats of a certain parcel of land referred to in a takings impact assessment (“TIA”) prepared by the city, as well as any other plats of the parcel. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. The requestor has submitted arguments in favor of releasing the information. *See* Gov’t Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the city is currently involved in litigation with the requestor in a suit styled *Gary v. City of San Marcos*, No. 2000-1060 (274th Dist. Ct., Hays County, Tex.). In support of this contention, you have provided this office with a copy of the Plaintiff's First Amended Petition and the Defendant's First Amended Answer and Counterclaim. You indicate that the plaintiffs in the case are challenging a city ordinance from the year 2000 on the ground that the city failed to perform a TIA before adopting the ordinance. Based on your statements and the information you have provided, we agree that the city was involved in pending litigation at the time it received the instant request for information. You further contend that the requested information relates to the pending litigation because it was prepared by the city to help evaluate the merits of the plaintiffs' claim in the *Gary* litigation and prepare a TIA related to the 2000 ordinance. The requestor disputes your contention that the submitted maps were prepared in connection with the litigation or the 2000 ordinance. Rather, the requestor contends that the maps were prepared in connection with a 2001 ordinance that is not at issue in the litigation. Therefore, we are faced with a dispute of fact regarding whether the submitted maps were prepared in connection with the *Gary* litigation. We cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Based on the city's assertion that the submitted maps were prepared in response to the claims in the *Gary* litigation and the ordinance at issue in the litigation, we find that the maps relate to pending litigation involving the city; therefore, the city may withhold the maps under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further,

the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Nathan E. Bowden".

Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 163529

Enc: Submitted documents

c: Mr. Grady Early  
214 Triple Crown Run  
San Marcos, Texas 78666  
(w/o enclosures)